IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 14TH MARCH 2007 / 23RD PHALGUNA 1928

Crl.Rev.Pet.No. 3263 of 2004(C)

MC.20/2003 of JUDL.MAGISTRATE OF FIRST CLASS, HARIPAD

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REVN. PETITIONER(S):

KERALA STATE WAKF BOARD, REPRESENTED
BY ITS CHIEF EXECUTIVE OFFICER,
PARAMARA ROAD, ERNAKULAM, KOCHI-682 018.

BY ADV. SRI.A.A.ABUL HASSAN, SC, WAKF BOARD

RESPONDENT(S):

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1. RASHEEDA, D/O.YOUNUS, KATTIL VEETTIL,
KIZHAKKEKARA THEKKUM MURI,
THRIKKANNAPUZHA VILLAGE.

2. STATE OF KERALA, REPRESENTED BY
ITS PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, KOCHI-682 031.

ADV. SRI.BIJI MATHEW FOR R1
SRI.S.SANKARAN THAMPI FOR R1
PUBLIC PROSECUTOR
SRI.P.A.ABDUL JABBAR, SC, WAKF BOARD

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 14.3.2007, THE COURT ON 14/03/2007 PASSED THE FOLLOWING:

K.HEMA, J.

CRL.R.P.NO.3263 OF 2004

Dated this the 14th day of March, 2007

O R D E R

Wakf Board is the revision petitioner. The Magistrate's Court directed the revision petitioner to pay Rs.450/- per month to the first respondent towards her maintenance under Section 4(2) of the Muslim Women (Protection of Rights on Divorce) Act ('the Act', for short) with effect from July, 2003 till she remains as a divorced woman. The said order is under challenge.

2. The first respondent filed a petition under Section 4(2) of the Act before the Magistrate Court alleging that she is a divorced Muslim woman who is unable to maintain herself. Her relatives mentioned under Section 4(1) of the Act have no means to pay maintenance to her. Therefore, she sought for a direction against revision petitioner to pay maintenance. Counter statement was filed by the revision petitioner contending that petitioner has not made her husband, relatives or the child as parties to the petition. To the information of the Board, respondent has brothers and relatives capable of doing work and earning income and they have sufficient income to provide maintenance, as per Section 4(1) of the Act. It is also contended that it is only if divorced woman who is unable to maintain herself left without any relative or such relatives or any of them who have no enough

means to pay maintenance ordered by the Magistrate's Court, the Board will be liable to pay maintenance. The Wakf Board's liability arises to pay maintenance only in the manner prescribed in Section 4 (2) of the Act. The petitioner has to prove that she is divorced by her husband.

3. To prove the case of the respondent, she examined PW1 to PW7 and marked Exhibit P1 on her side. The respondent did not adduce any evidence. The court below found that respondent was divorced. But learned counsel for the revision petitioner vehemently contended that the divorce alleged in the petition has not been proved. According to him, three 'thalak' pronounced on the same day will not constitute divorce. The court below has not considered the said fact, it is contended.

4. The trial court also proceeded as if, PW2 to PW6 are the only prospective legal heirs of the petitioner and that they have no means to maintain the petitioner. Learned counsel for the revision petitioner strongly contended that as per the evidence of PW3 and PW6, the two brothers have sufficient means. Even as per their own admissions, one of them is an autorickshaw driver, who is also having a badge. So it is possible for him to raise money. Both of them admitted that they are having some income. Therefore, the court went wrong in holding that legal heirs referred to in sub-section (1) of Section 4 of the Act have no

means to maintain the revision petitioner, it is argued.

5. On going through Section 4(1) and (2) of the Act and the order under challenge, I find that the trial court has not considered all the relevant facts which are necessarily to be considered for disposing of an application filed under Section 4(2) of the Act. The first question is, who are the relatives of the divorced woman who would be entitled to inherit her property on her death. It was pointed out that if a divorced woman has only a male child and parents, they alone will be the legal heirs of the divorced woman. On the other hand, if the child is a female, apart from the parents of the divorced woman, her brothers and sisters also will be entitled to inherit her property, as stated in Section 4(1) of the Act. If the divorced woman has only a female child and the father, the mother being pre-deceased, only the father and the female child alone will be the legal heirs. Their share will be one-half each. So also if the divorced woman is not having a child and the only parents are alive, the parents alone will be relatives as referred to in Section 4(1) of the Act, it is submitted.

6. In the light of the above facts, it is incumbent on the trial court to first raise a point as to who are the relatives of the divorced woman who would be entitled to inherit property on her death, according to Muslim Law. It is only after deciding this fact that the court can proceed only further. This is quite relevant because the proportion of

the shares are involved in fixing the quantum of maintenance to be paid by each of the relatives. In this case the trial court has not considered this aspect at all, but proceeded as if legal heirs are PW2 to PW6. The court has ignored this fact that the female child are also relatives as stated in Section 4(1) of the Act. Unless this fact is also taken into consideration, there will be difficulty in fixing the share of maintenance to be paid by such relatives and consequently, the Wakf Board. The omission to raise such point and consider this aspect will cut the root of the matter and hence, interference is called for.

7. A reading of Section 4 of the Act also shows that the liability of the Wakf Board arises only if the divorced woman is unable to maintain herself and she has no relative as mentioned in Section 4(1) or such relatives or any one of them have no enough means to pay maintenance ordered by the Magistrate or the other relatives have no means to pay the shares or those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the proviso to Section 4(1) of the Act. The Wakf Board's liability is also only to pay such share of such relatives who are unable to pay maintenance. So, the liability of the Wakf Board depends upon proportion of the shares which the relatives under Section 4(1) of the Act will be liable to pay if an order has to be passed, in accordance with Section 4(1) of the Act.

8. But the court has not directed its attention to this important aspect or considered as to what would be the share of such relatives who are liable to pay maintenance under sub-section (1) of Section 4 of the Act. Without fixing such share, it is not legal to direct the Wakf Board to pay any amount of maintenance. The Wakf Board is liable to pay only the shares of such of the relatives who are unable to pay, as referred to sub-clause (2) of Section 4 of the Act. The trial court has to consider that all the requirements under Sections 4(1) and 4(2) of the Act are satisfied before passing a direction to the Wakf Board to pay maintenance.

9. Then another question would arise whether the court is bound to pass an order as referred to in first proviso to Section 4(1) first proviso or the second proviso before passing an order under Section 4 (2) of the Act, directing the Wakf Board to pay maintenance. But the Supreme Court has made the position clear. As per the dictum laid down in ***Secretary, Tamil Nadu Wakf Board and another v. Syed Fatima Nachi*** (AIR 1996 SC 2423) even in cases where no order has been passed, if the court finds that the Wakf Board has controverted that the relatives mentioned in the provision or some of them have the means to pay maintenance to the divorced wife, it will be open to the Magistrate to add those relatives as parties to the litigation.

10. A reading of the order under challenge will go to show that

the trial court has imposed a liability on the Wakf Board to pay Rs.450/- per month as monthly maintenance to the divorced wife without considering the relevant facts under Section 4 of the Act. A reading of Section 4 of the Act would go to show that the State Wakf Board can be directed to pay maintenance, as determined by the court under Sub-section (1) of the Act or as the case may be, to pay the shares of such of the relatives who are unable to pay maintenance. Therefore, it is clear from Section 4(2) of the Act that before passing an order to pay maintenance against the State Wakf Board, the court shall determine the amount of maintenance which a divorced woman is entitled to get under sub-clause (1) of Section 4 or the shares of such of the relatives who are unable to pay as decided by the court under sub-section (1) of Section 4 of the Act.

11. The quantum of maintenance cannot be fixed by looking into the needs of the divorced woman alone or the capacity of the Wakf Board. What is relevant to be looked into is what is the amount of maintenance which shall be payable by the relatives referred to in sub-section (1) of Section 4 of the Act or the shares of such relatives who are unable to pay maintenance. In the absence of arriving at a decision regarding the amount to be paid by the relatives under Section 4(1) of the Act, the court cannot arrive at the quantum of maintenance which the Wakf Board is liable to pay. The court has not considered this

aspect at all before directing the Wakf Board to pay Rs.450/- as maintenance.

12. It is curious to note that the trial considered the fact that the counter petitioner is a public institution and its funds should not be spent without any just cause. It was also held that the courot has minimised the request of petitioner. These facts are totally irrelevant for consideration for fixing the quantum to be paid by the Wakf Board. The question whether the fund is of a public institution shall not dissuade the court from reducing the amount which a divorced woman is entitled to get, after computing the quantum of maintenance under Section 4(1) of the Act. If the court finds that the divorced woman is entitled to get a particular amount from the relatives or such other relatives as stated in Section 4(1) of the Act, the court cannot hesitate to direct the State Wakf Board to pay maintenance, irrespective of whether it is a public institution or not.

In the above circumstances, I hold that the order under challenge is not legal or proper and it is liable to be set aside. The court shall raise such points as are required by virtue of Section 4(1) and 4(2) of the Act and decide the questions afresh and dispose of the case in accordance with law. In the light of the dictum laid down in ***Secretary, Tamil Nadu Wakf Board and another v. Syed Fatima Nachi*** (AIR 1996 SC 2423) the trial court also consider whether the

relatives referred to in sub-section (1) of Section 4 of the Act are to be added as the parties to the litigation, before passing of the final order. The case shall be disposed of as expeditiously as possible, after giving notice to counsel appearing on both sides.

This Revision Petition is allowed.

K.HEMA, JUDGE

vgs.